LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
JAN 21 1963
JOHN F. DAVIS, CLERK

In the

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

**No. 59**

A. J. SIMLER,
*Petitioner,*

VERSUS

LESLIE L. CONNER,
*Respondent.*

## REPLY BRIEF FOR THE PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN B. OGDEN,
1408-9 Liberty Bank Building,
Oklahoma City 2, Oklahoma,
*Attorney for Petitioner,*

*Of Counsel:*

JACK M. HIGHLY,
Mutual Savings Building,
Oklahoma City, Oklahoma.

January, 1963.

UTTERBACK TYPESETTING CO., 13 So. Walker, Oklahoma City, Ph. CE 5-8750

Opinions Below 1

Questions Presented 2

Conclusion 26

Certificate 29

## AUTHORITIES CITED

CASES:

Burnett, et al. v. Graves, et al., Ct. App. (5th Cir.), 230 F.2d 49 25

Callen v. Pennsylvania R. Co., 162 F.2d 832 15-16

Callen v. Pennsylvania R. Co., 332 U.S. 625, 68 S.Ct. 296 18

Canning v. Star Publishing Company, 138 F. Supp. 843 13-14

Cassel v. Gregori, et al., 70 P.2d 721 7

Cueno Press, Inc. v. Claybourn Corporation, 90 F.2d 233 26-27

Dairy Queen, Inc. v. Honorable Harold K. Wood, 82 S.Ct. 894 22-24

Dickinson v. General Accident F. & L. Assur. Corp., 147 F.2d 396 14-15

Enelow v. New York Life Ins. Co., 293 U.S. 55 S.Ct. 310 18-20

Ettelson v. Metropolitan Life Ins. Co., 137 F.2d 62 16-18

Hargrove v. American Ins. Co., 125 F.2d 225 20-21

Hauenstein v. McCalister, 172 Okla. 613, 46 P.2d 552 6, 26

INDEX CONTINUED


| | PAGE |
|---|---|
| Johnson v. Tanner, 369 P.2d 307 | 26 |
| Maddox, Luther Robinson v. Fidelity Investment & Title Co., Inc., No. 8461, U.S. Ct. App. (4 Cir.), 300 F.2d 1 | 10 |
| Minnesota Mutual Life Insurance Company v. Brodish, 200 F. Supp. 777 (1962) | 12-13 |
| Rupp, A. C. v. Cortland N. Cool (Colo.), 362 P.2d 396 | 6-7, 9, 26 |
| Thermoid Rubber Co. v. Bank of Greenwood, 1 F.2d 891 | 21-22 |
| STATUTES: | |
| 28 U.S.C. 1254(1) | 2 |
| MISCELLANEOUS: | |
| 7 C.J.S., p. 964, Art. 127(a) | 24-25 |
| 7 C.J.S. Attorney and Client, Sec. 204(2) | 7 |
| 37 C.J.S., p. 448, Art. 123 | 22 |
| 50 C.J.S. 778, Art. 74 | 9 |

In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 59

A. J. SIMLER,
*Petitioner,*

VERSUS

LESLIE L. CONNER,
*Respondent.*

# REPLY BRIEF FOR THE PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## OPINIONS BELOW

The opinion to be reviewed herein is styled: A. J. Simler, Appellant v. Leslie L. Conner, Appellee, 295 F.2d 534, wherein the Circuit Court denied the petitioner a jury trial. Prior to the rendition of this opinion by the United States Court of Appeals, Tenth Circuit, the Court of Appeals, Tenth Circuit, in the same case reversed and remanded the cause to the United States District Court for the Western District with instructions to grant a jury trial in conformity with the views expressed in the opinion. This case is found in 282 Federal Reporter 2nd Series beginning on page 382.

Prior to the last mentioned opinion, and on January 7, 1960, in an action styled A. J. Simler, Petitioner v.

Honorable Stephen S. Chandler, U. S. District Judge for the Western District of Oklahoma, Respondent, on Petition for Writ of Mandamus, the United States Court of Appeals, Tenth Circuit, entered its Order and Judgment, paragraph 1 of said Order being as follows:

> "That the Honorable Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma is hereby directed and ordered to vacate all orders heretofore entered by the United States District Court for the Western District of Oklahoma denying a jury trial to the plaintiff in that certain action entitled A. J. Simler, plaintiff, v. Leslie L. Conner, defendant, Civil No. 8008, and submit to a jury for determination all disputed issues of fact arising in such action."

The United States District Judge, the late W. R. Wallace, before whom the case was originally pending, granted a jury trial as reflected by the record (p. 71).

The judgment of the Court of Appeals involved herein was entered on October 12, 1961 (R., pp. 115-117, incl.), rehearing denied November 18, 1961, Petition for Certiorari filed December 29, 1961, *certiorari* granted January 15, 1962 (82 S.Ct. 440).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESIONS PRESENTED

The only question to be presented in this Reply Brief will only go to the question of whether or not the Petitioner is entitled to a jury trial under Federal procedure. In order for the Court to have before it a full and complete state-

ment of the contention of the Petitioner, we deem it necessary to make a brief statement concerning the state of the pleadings and the facts as reflected by the Record herein. The Court will probably recall from the argument that factually the Respondent had been the attorney for the Petitioner, and the parties could not agree upon what a reasonable fee for compensation should be, and the Petitioner filed his Complaint on April 24, 1958, in the United States District Court for the Western District of Oklahoma seeking a declaratory judgment to determine what, if any, fee he owed to the Respondent as attorney's fees and set forth the amount he had paid out prior thereto.

The Respondent, defendant in the court below, filed an Answer and Counterclaim. In the Answer and Counterclaim, which appears beginning on page 6 of the Record, and continuing through page 23, in which he contends that the original agreement or employment contract dated July 18, 1952, which was a letter of employment, signed by Mr. Simler, was modified by a letter dated September 25, 1952, and which letters are in words and figures as follows, to-wit:

"July 18, 1952

"Mr. Leslie L. Conner, Atty.,
410-414 Hightower bldg.,
Oklahoma City, Oklahoma.

Dear Sir:—

Re: Birdine Fletcher Estate
County Court Oklahoma County, Oklahoma.

This confirms our employment of your self and law firm to represent us in the matter of the Estate of Birdine Fletcher, deceased, now pending in the County

Court of Oklahoma County, Oklahoma, wherein certain people have filed petition to probate an alleged will supposed to be signed by her.

We agree to pay all the witness fees, court costs, furnish all bonds, purchase copy of all records from court reporters, prepare the evidence and pay all necessary bills to contest the admission of this will to probate because we do not believe it is a valid will. We understand that this will run in the approximate neighborhood of $1,000.00.

We also agree to pay you and your firm a reasonable attorneys fee for the services rendered and to be rendered in this case in the County Court, and if necessary in the District Court and if necessary in the Supreme Court of the State of Oklahoma, which fee may be set by the County Court or any other court, if the matter is successful either by trial or judgment or compromise.

If the matter is not won, compromised or settled, you are not to charge us a fee.

Yours truly,
/s/ A. J. SIMLER
A. J. Simler, for
himself and his children."

"Oklahoma City Oklahoma
October 14, 1952

"Conner, Hilpirt and Britton
Attorneys and Counselors at Law
Hightower Building
Oklahoma City, Oklahoma

Gentlemen:—

This is your authority and direction to file an action in the United States District Court for the Western

District of Oklahoma, brought by me as the Plaintiff against W. H. Wilson as Executor of the Estate of Birdine Fletcher, and Sisters of St. Francis, a foreign Corporation, in which action we are to sue to void the Will insofar as the Real Estate in Caddo County, Oklahoma, is concerned, and for such other matters as the Court may determine in Declaratory judgment.

Yours very truly,
/s/ A. J. Simler.
A. J. Simler"

These letters are on pages 23, 24 and 25, and also on page 23 is the letter of October 14, 1952, authorizing a suit in the Federal Court against the executor of the estate of Birdine Fletcher, deceased, and against the Sisters of St. Francis, a foreign Corporation, which letters are self-explanatory.

We deem it necessary to first call to the Court's attention the position and contention of the Petitioner with reference to the validity of the second letter dated September 25, 1952, and for brevity's sake and convenience, we will hereafter refer to the first letter as the letter of July 18th, and the second letter as the letter of September 25th, and the third letter as the letter of October 14th.

The contract of employment, as we view it, must be governed by the laws of the State of Oklahoma, that is; the construction of the contract. It will be noted that the letter of September 25th was prepared by Mr. Conner and signed by Mr. Simler while the relationship of attorney and client existed and which had existed since the 18th of July.

The Supreme Court of Oklahoma passed squarely on a situation of this kind in the case of *Hauenstein* v. *McCalister*, 172 Okla. 613, 46 P.2d 552, it being a lawsuit between an attorney and client and involving a contract made between the attorney and client after such relationship existed, and the Supreme Court of Oklahoma used the following language:

> "It is a well established rule of law that contracts between attorney and client to the advantage of the attorney, made while such relation exists, are presumptively fraudulent, and the burden of proof is upon the attorney to show that such contracts are fair, just and equitable, AND EVEN THEN HE IS NOT ENTITLED TO RECOVER MORE THAN REASONABLE COMPENSATION FOR HIS SERVICES, REGARDLESS OF THE CONTRACT PRICE." (Emphasis supplied.)

We therefore earnestly urge upon the Court that regardless of the second letter or its provisions or contents the Respondent could not receive more than or recover more than reasonable compensation for his services regardless of the contract price. We also call to the Court's attention the fact that the rule of law announced above by the Supreme Court is the general law in all states.

In the case of *A. C. Rupp* v. *Cortland N. Cool*, Supreme Court of Colorado, 362 P.2d 396, involved a suit between an attorney and client, and that Court said:

> "Once the confidential relationship of attorney and client exists, the law governing contracts entered into between them is very different. The test applied to such contracts when the attorney seeks to enforce the

same is well stated in 7 C.J.S. Attorney and Client Sec. 204(2):

> "Where after the relationship has been established, an attorney and client enter into an agreement in reference to the attorney's compensation, * * * the burden is on him to prove that the agreement was fairly and openly made, was supported by an adequate consideration, and that he gave the client full knowledge of the facts and of his legal rights, when he entered into the agreement, and that the services to be performed were reasonably worth the amount stated in the agreement. * * *."

The legislature of California passed an act whereby it gave the trial judge the right to determine attorneys fees without a jury where the attorney was discharged and the matter was presented to the appellate court in Los Angeles, and is styled *Cassel* v. *Gregori, et al.*, 70 P.2d beginning on page 721, and that Court held that the legislature was not authorized to pass such an act and deprive one of the right to a trial by a jury and held the act unconstitutional, and the Court stated in the last paragraph as follows:

> "* * * This does not mean, however, that the Legislature may at will create new forms of special procedure, parcel out among them the subject-matter of the ordinary actions at law heretofore triable by jury, and thereby whittle away the right to a jury trial. * * *"

The reply of the Petitioner to the Answer and Cross-Complaint of the Respondent appears beginning on page 41 of Record, concluding on page 49, and the Amended Reply to Defendant's Counter-Claim beginning on page 70

and continuing through page 80. In such Reply and Amended Reply, the Petitioner alleges that the September 25th letter was void for the following reasons:

First, there was no consideration for the execution of said letter by reason of the fact that the Respondent was already bound to represent the Petitioner to his best knowledge, skill and understanding and consequently the signing of said letter by the said Petitioner did not constitute a contract because it lacked consideration and was therefore void

Second, the Reply and Amended Reply further alleged that the said letter lacked mutuality; that is; that it only expressed the will of Mr. Conner, the Respondent, and that the Petitioner was induced to sign said letter by fraud, actual and constructive, and by misrepresentation and by undue influence and for such reason said letter could not be enforced and should not be enforced against the said Petitioner.

This, then, brings us to the point as to whether or not under such allegations where a jury has been properly demanded for such matter a question to be submitted to the jury or to the Court. In presenting the matter, we wish first to call the Court's attention to the fact that the Respondent is relying upon such letter of September 25th, and is attempting to enforce it and the petitioner is merely resisting the enforcement of said letter on account of the above reasons. Therefore, we have as a defense to the enforcement of said letter fraud, actual and constructive, and lack of consideration, lack of mutuality, and undue influence.

We think it well to bear in mind in considering the pleadings in this case and the letter of September 25th, that such letter under the law of Oklahoma and under the law of most states, is presumptively fraudulent and the burden of proof is upon the attorney to show that such contracts are fair, just and equitable and even then he is not entitled to recover more than reasonable compensation for his services regardless of the contract price. Therefore, when it appears in the pleadings in any case that the contract between the attorney and client was made after such relationship existed; the burden then is upon the attorney and not on the client and the contract is presumed to be fraudulent and the Colorado Court said that it is likewise presumed to be without consideration. *Rupp v. Cool, supra.*

The question then is whether the defense of fraud to a Cross-Complaint seeking enforcement of a contract should be submitted to the jury, and in this connection we call the Court's attention to the following:

In 50 C.J.S. 778, Article 74, the following statement is made:

> "Where there is a dispute over the terms of an agreement as to the fee to be paid (Merritt v. Cuthbert Bank, 85 S.E. 104, 143 Ga. 394, 35 C.J. p 188 note 36), and also where it is provided by statute that in an action for damages plaintiff if successful may recover a reasonable attorney's fee, (Briggs v. St. Louis & S. F. R. Co., 20 S.W. 32, 111 Mo. 168, 35 C.J. p 188 note 37) the amount of such fee must be determined by a jury, and the attorney does not lose the right to a jury trial because he is an officer of the court. (In re Murphy, 101 A. 935, 258 Pa. 38, In re Kennedy, 14 A. 397, 120 Pa. 497, 6 Am.S.R. 724)."

In the case of *Luther Robinson Maddox v. Fidelity Investment & Title Co., Inc.*, No. 8461, United States Court of Appeals, Fourth Circuit, 300 F.2d 1, the Court used this language in the body of the opinion:

> "These counts sought damages for breach of contract. The defense denied the contracts were fair and reasonable under the circumstances. Testimony took five trial days. The Court submitted the case to the jury under a charge that was not excepted to and which was completely fair to plaintiff. The trial judge properly instructed the jury that an attorney's agreement as to fees must be fair and reasonable, in view of the confidential relationship which exists between attorney and client. The court further instructed the jury as to the factors to be considered in determining whether the agreement was fair and reasonable. The jurors were also instructed that if they found the agreements were not fair and reasonable, they should award the plaintiff such amount over and above what he had already been paid that seemed to them to be fair and reasonable under all the evidence The jury had the benefit of Maddox's testimony in voluminous detail as to the work he had performed and found that he had been adequately compensated by sums he had received prior to his discharge. This lays the matter to rest, once and for all. Where, as here, there is an evidentiary basis for the jury's verdict, the appellate court cannot be asked to substitute its judgment for that of the jury. Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946)."

COMMENT: While the Court submitted the case to a jury under proper instructions with reference to the second and/or third contracts entered into between the attorney and client and apparently there was no question raised as

to the right of jury trial under such circumstances, but nevertheless, it was a case between attorney and client under very similar circumstances to the case at bar.

For emphasis sake, we call to the Court's attention that in this case, the Respondent is seeking to enforce the letter of September 25th and the Petitioner is defending on the ground of no consideration, fraud and a breach of a fiduciary relationship and if any of the defenses interposed in the letter are true, the Respondent would not be entitled to prevail on the letter, but nevertheless would be entitled to a reasonable attorney's fee in view of all the circumstances in the case to be determined by the jury.

The late W. R. Wallace, United States District Judge, when the question was raised as to a jury trial, used the following language (R. 71):

> "The Court will permit the introduction of both letters in question as representing the contract between Mr. Simler and Mr. Conner, and the issues to be resolved by the jury are whether this contingent fee contract was made in good faith, without fraud or overreaching by Mr. Conner and whether the compensation bargained for was just and fair. If the jury determines that the two letters in question are enforceable then the terms therein will control. However, if for any reason, the jury strikes down the second letter as having been gained through fraud or overreaching then the jury will have to determine just what constitutes a reasonable fee under the circumstances.
>
> "Very truly yours,
>
> "/s/ W. R. Wallace."

We feel that Judge Wallace was entirely correct in his holding that the Petitioner was entitled to a jury trial.

In the case of *Minnesota Mutual Life Insurance Company* v. *Brodish*, 200 F. Supp. 777 (1962), the Court said:

"1. Where common issue is involved both at law and in equitable proceeding, constitutional right of trial by jury must prevail. U.S.C.A. Const. Amend. 7.

"2. Declaratory judgment act preserves right to jury trial. 28 U.S.C.A. §§ 2201, 2202; U.S.C.A. Const. Amend. 7.

"3. Question of fraudulent misrepresentation was decisive of issue both in insurer's action for judgment declaring life policies void because of fraudulent misrepresentations and seeking rescission and cancellation of policies and in beneficiary's counterclaim for face amount of policies, and beneficiary could not be deprived of constitutional right to jury trial on such issue by suspending action on counterclaim and trying complaint for declaratory judgment without jury. 28 U.S.C.A., Sections 2201, 2202; U.S.C.A. Const. Amend. 7.

"(2, 3) the Beacon case was a suit neither in equity nor at law, but a statutory proceeding under the Declaratory Judgments Act (28 U.S.C. Sections 2201, 2202), a remedy provided by Congress in which trial by jury is preserved (Beacon Theatres v. Westover, supra; at p. 504, 79 S.Ct. 984). But the plaintiff there sought the equitable aid of injunction, just as here in a declaratory judgment suit plaintiff seeks the equitable remedy of rescission and cancellation. The issue of fraudulent misrepresentation is decisive of the issue in both the plaintiff's suit and the counterclaim. For if the insured was guilty of fraudulent misrepresentation the beneficiary cannot recover. This issue it is

the defendant's right under the Seventh Amendment to have decided by a jury. Even where this a purely equitable proceeding, and not a statutory declaratory judgment action, the Beacon doctrine tells us that the longest footed chancellor may not cross the line established by the Seventh Amendment.

"The motion to suspend action on the counterclaim therefore must be denied. The case should remain on the civil jury trial list and not on the civil non-jury trial list. When it is reached for trial both the complaint and counterclaim will be tried together before a jury.

"We accordingly enter the following

ORDER

"AND NOW, January 10, 1962, the motion to suspend action on the counterclaim is denied. Both the complaint and counterclaim shall be tried by jury pursuant to defendant's demand for jury trial."

In *Canning* v. *Star Publishing Company*, 138 F. Supp. 843, United States District Judge Leahy, Chief Judge, used this language:

"(3) Nothwithstanding these careful distinctions, I think the better view, and one more widely accepted by the courts, is to try the issue of fraud, whether in the execution or inducement, in an instrument under seal or not, before a jury where the issues are otherwise legal. This Circuit has, to some extent, taken that position in Ettelson v. Metropolitan Life Insurance Company, 3 Cir., 137 F.2d 62. There, defendant sought in his counterclaim, rescission for fraud in the inducement of insurance policies sued upon by plaintiffs. Demand for trial by jury was filed by plaintiffs, along with a motion to dismiss the counterclaim. The district court denied the motion and ordered preliminary con-

sideration of the counterclaim without a jury. D.C.N.J., 42 F. Supp. 488. The Court of Appeals, in reversing the order, recognized, although fraud is an issue equitable in origin, it has long been treated in the courts of the common law. Said the Court (per Judge Goodrich), 137 F.2d at page 64: 'The practical result of the determination of the present issue is whether the plaintiffs are to have a jury trial, or whether the defendant may have the fraud issue tried by the judge.' And at pages 65-66 of 137 F.2d 'Our conclusion is, therefore, that the federal rule is as broad as its statement and covers all that may be included in the term fraud, whether characterized by the adjective 'legal' or 'equitable.' The issue on such a defense was tried by a jury prior to the present rules; it continues to be so triable since." Certiorari was subsequently denied by the Supreme Court in 320 U.S. 777, 64 S.Ct. 92, 88 L.Ed. 467.

"At times, particularly where claims on insurance policies are concerned, a separate trial on the issue of validity of the release has been granted under FR 42(b) to avoid inconvenience or prejudice. In such cases the issue of fraud, whether in the execution or in the inducement, has been argued before a jury.

"In the situation where defendant raises the defense of a release in his answer, and plaintiff replies on the ground of fraud, trial by jury has been conceded along with the other legal issues in the action. But, it is contended in the instant case, where plaintiff affirmatively seeks equitable relief in the complaint, as was done here, the issue should be tried to the court. While there is some authority to sustain this differentiation, it has been refuted by recent decisions."

In the case of *Dickinson* v. *General Accident F. & L. Assur. Corp.*, 147 F.2d 396, the Court said in the syllabus as follows:

"(1) The primary question on the appeal is whether this treatment of the verdicts was error. We think it was. The right to a jury trial of factual issues ordinarily triable to a jury is expressly preserved by the declaratory judgment statute. In the absence of the procedure for declaratory relief it is plain that the issues here litigated could have been developed only in an action at law on the policy. A party may not, merely by reversing the normal procedure, deprive his adversary of the right which would otherwise be his to have his case determined by a jury. Pacific Indemnity Co. v. McDonald, 9 Cir., 167 F.2d 446, 448, 131 A.L.R. 208; Hargrove v. American Cent. Ins. Co., 10 Cir., 125 F.2d 225.

"The issues here tried pertaining to the giving and to the waiver of notice are basically legal. The issue of estoppel in pais tendered in the amended answers, while equitable in origin, has long been one cognizable as of course in the courts of common law. In this case the issue was submitted to the jury under appropriate instructions, and we do not doubt it was the jury's exclusive province to decide it. Kellogg-Mackey-Cameron Co. v. Havre Hotel Co., 9 Cir., 173 F. 249; Smith v. Royal Ins. Co., 9 Cir., 93 F.2d 143, 146; City of Ironton v. Harrison Const. Co., 6 Cir., 212 F. 353; Letta v. Cincinnati Iron & Steel Co., 6 Cir., 285 F. 707; E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co., 6 Cir. 170 F. 240; Insurance Co. v. Wilkinson, 13 Wall. 222, 20 L.Ed. 617."

In the case of *Callen v. Pennsylvania R. Co.*, 162 F.2d 832, the Court said:

"* * * There was thus in the trial some evidence of mutual mistake regarding Callen's injuries, an important element in the settlement. That evidence in

order to void the release, had to be clear, unequivocal, and convincing. Chicago & N. W. Ry. Co. v. Wilcox, 8 Cir., 116 F. 913, 914; Restatement of Contracts, Sections 502, 511. Whether the testimony here considered fulfilled those conditions was for the jury to pass upon under the guidance of the Court's instructions."

In the case of *Ettelson* v. *Metropolitan Life Ins. Co.*, 137 F.2d 62, the Court said:

"(4) Having concluded that the rule of Erie R. Co. v. Tompkins does not affect the procedure in the pending case, the final question is whether the defendant is entitled to have its counterclaim tried by the court, as though the judge was sitting in equity, before the present rules, or whether the plaintiffs are entitled to have the issue tried by a jury. Although under the Federal Rules of Civil Procedure claims and defenses formerly cognizable either at law or equity have been merged into one action, a civil action, the rules have neither enlarged nor diminished the right to either a jury or court trial Basic issues formerly triable as of right by a jury are still triable by a jury as a matter of right. Rule 38, 28 U.S.C.A. following section 723c. The same obtains where the right previously existed to have an issue tried by the court. We must then inquire whether prior to the adoption of the Federal Rules of Civil Procedure a defense of 'equitable' fraud to an action for the proceeds of a life insurance policy was within the exclusive jurisdiction of equity. If it was, then there is no right to the jury trial demanded and defendant's contention that the matter raised in the counterclaim should be tried by the court must be sustained, not because of Erie R. Co. v. Tompkins, but because that is the federal court law on the subject."

"(5) We turn then to the federal decisions. The general rule pronounced by the Supreme Court is that in insurance cases, in the absence of special circumstances, which are not present here, 'fraud in the procurement of insurance is provable as a defense in an action at law upon the policy, resort to equity being unnecessary to render that defense available.' American Life Ins. Co. v. Stewart, 1937, 300 U.S. 203, 212, 57 S.Ct. 377, 379, 81 L.Ed. 605, 111 A.L.R. 1268, citing Enelow v. New York Life Ins. Co., 1935, 293 U.S. 379, 385, 55 S.Ct. 310, 79 L.Ed. 440; Adamos v. New York Life Ins. Co., 1935, 293 U.S. 386, 55 S.Ct. 315, 79 L.Ed. 444; Insurance Co. v. Bailey, 1867, 13 Wall. 616, 20 L.Ed. 501; Cable v. United States Life Ins. Co., 1903, 191 U.S. 288, 306, 24 S.Ct. 74, 48 L.Ed. 188.

"(6, 7) In none of these decisions, however, is the distinction between 'legal' and 'equitable fraud' expressly drawn. The defendant has urged that the cases involved 'legal fraud' and the rule laid down applied only in such instances. With this contention we do not agree. We find federal decisions going back for more than a hundred years in which, in suits on insurance policies, the question of fraud whether consisting of conscious or innocent misstatement or nondisclosure has been tried by a jury in an action at law on the policy. Three of the decisions to this effect were written by no less an eminent authority on equity jurisprudence than Justice Story. McLanahan v. The Universal Insurance Company, 1825, 1 Pet. 170, 185, 7 L.Ed. 98; Carpenter v. American Ins. Co., C.C.D.R.I., 1839, 5 Fed.Cas. page 105, No. 2,428; Hazard v. New England Marine Ins. Co., C.C.D. Mass., 1832, 11 Fed. Cas. page 937, No. 6, 282, reversed on other grounds, 1834, 8 Pet. 557, 8 L.Ed. 1043, but expressly affirming the point involved here, 8 Pet. at page 583, 8 L.Ed. 1043. See also Carrollton Furniture Mfg. Co. v. Ameri-

can Credit Indemnity Co. of New York, 2 Cir., 1902, 115 F. 77; affirmed on rehearing, 2 Cir., 1903, 124 F. 25, certiorari denied, 1904, 192 U.S. 605, 24 S.Ct. 849, 48 L.Ed. 585.

"Our conclusion is, therefore, that the federal rule is as broad as its statement and covers all that may be included in the term fraud, whether characterized by the adjective 'legal' or 'equitable.' The issue on such a defense was tried by a jury prior to the present rules; it continues to be so triable since.

"The order of the District Court is reversed and the case remanded for further proceedings in accordance with this opinion."

In *Callen* v. *Pennsylvania R. Co.*, heretofore cited in the Circuit Court opinion, in which *certiorari* was granted, 332 U.S. 625, 68 S.Ct. 296, with reference to withdrawing from the consideration of the jury, and this Court said in the body of the opinion as follows:

"(1) The Circuit Court of Appeals, quite rightly we think, construed the charge of the District Judge as withdrawing the question of validity of the release from the jury and said (162 F.2d 832, 834): 'This was palpable error under the facts relating to the release and entirely aside from the Court's incorrect assumption that there was no dispute about the permanency of the injuries'."

This Court has specifically and directly held that the defense of fraud to a written instrument is triable by a jury. In the case of *Enelow* v. *New York Life Ins. Co.*, 293 U.S., 55 S.Ct. beginning on page 310 and quoting from the body of the opinion as follows:

" * * * Here, on the death of the insured, an action at law was brought on the policy, and the defendant had opportunity in that action at law, and before the policy by its terms became incontestable, to contest its liability and accordingly filed its affidavit of defense. That defense was solely that the defendant had been induced to issue the policy by false answers in the application which were alleged to have been made by the applicant 'with knowledge of their falsity and fraudulently' in order to obtain the insurance. The affidavit of defense showed nothing whatever as a further ground for equitable relief, and the respondent is necessarily confined to the case it made. In such a case, the defense of fraud is completely available in the action at law, and a bill in equity would not lie to stay proceedings in that action in order to have the defense heard and determined in equity. Phoenix Mut. Life Insurance Co. v. Bailey, 13 Wall. 616, 623, 20 L.Ed. 501; New York Life Insurance Company v. Bangs, 103 U.S. 780, 782, 26 L.Ed. 608; Cable v. United States Life Insurance Co., 191 U.S. 288, 305, 24 S.Ct. 74, 48 L.Ed. 608; American Mills Co. v. American Surety Co., 260 U.S. 360, 363, 43 S.Ct. 149, 67 L.Ed. 306; New York Life Insurance Co v. Marshall (C.C.A.) 23 F2d 225; New York Life Insurance Co. v. Miller, supra. Respondent was in no better position under section 274b (28 USCA section 398).

"(7) Nor is there merit in the contention that the remedy at law is not adequate because petitioner is not the only person interested in the policy and that the premiums paid would be refundable to the decedent's executors. The executors have no interest entitling them to enforce the policy. Petitioner is the sole beneficiary of the policy, and is entitled to recover upon it, if it is valid, and cannot prevail if the defense of fraud is established. Insurance Co. v. Bailey,

supra; Cable v. United States Life Insurance Co., supra."

COMMENT: This was a contract of insurance. The defense was, of course, that it was obtained by fraud. The Court held this to be a jury trial. In the case before the Court, the Respondent filed his Answer and Cross-Complaint and he alleged the execution of the letter of September 25th. The plaintiff in that case, Petitioner here, filed his Reply to the Answer and Cross-Complaint and alleged the letter was procured by fraud, actual and constructive and that it was without consideration and he demanded a jury. Therefore, under the above authority, clearly Petitioner is entitled to a jury in the Federal Court, and if he present fraud in the procurement of said letter or failure of consideration, the jury will nevertheless fix for him a reasonable attorney's fee but not based upon the letter of September 25th.

In the case of *Hargrove* v. *American Cent. Ins. Co.*, 125 F.2d beginning on page 225, the Court said:

> "The basic issue tendered by the pleadings and the proof is the liability of the insuror on the contracts of insurance because of the alleged fraudulent conduct and false swearing of the insured. THE CASE IS BOTTOMED ON FRAUD WHICH, IF PROVED, WOULD VITIATE THE CONTRACT BETWEEN THE PARTIES. Singleton, et al. v. Hartford Fire Ins. Co., 105 Cal.App. 320, 287 P. 529; Orenstein et al. v. Star Ins. Co. of America, 4 Cir., 10 F.2d 754; 33 Corpus Juris, p. 19, § 667." (Emphasis supplied.)
>
> "* * * If the insured had filed suit on the policies, the asserted remedy would have been legal in its nature and either party would have been entitled to a jury on

timely demand as provided by the rules of civil procedure. In this event, the insurors could have asserted the same remedy as a legal or equitable defense to the legal action to recover. Pacific Indemnity Co. v. McDonald, supra.

"(9) The insuror therefore had a plain and adequate remedy at law and the issues tendered were basically legal in their nature, and the case was triable as of right by jury. Englow v. New York Life Ins. Co., 293 U.S. 379, 55 S.Ct. 310, 79 L.Ed. 440. Cf. American Life Ins. Co. v. Stewart, 300 U.S. 203, 57 S.Ct. 377, 81 L.Ed. 605, 111 A.L.R. 1268."

COMMENT: It will be noted that fraud completely destroys the contract and makes it wholly and completely unenforceable and no rights can be secured under a contract obtained by fraud.

In the case of *Thermoid Rubber Co. v. Bank of Greenwood*, 1 F.2d 891, beginning on page 891, and without burdening the Court with the facts, but there was the allegation of fraud likewise and the Court said in the body of the opinion as follows:

"(1, 2) It is not for us to say where the truth lies. That is a jury question. In his instructions below, the learned judge practically withdrew this issue from the jury, because, as he understood the pleadings, the Thermoid based its right to recover solely upon a letter written in the name of the Bank by Watson to the Thermoid, in answer to an inquiry made by the latter as to the financial responsibility of the Tire Company. It is true that the complaint of the Thermoid, after having alleged the scheme to defraud persons who could be induced to sell tires to the Tire Company, as we have already summarized it, and after having charged

that it was participated in by the Bank, as well as by J. C. Self, did say that a part of it was that the Bank, through Watson, should make and issue to manufacturers and dealers, including the Thermoid, false and fraudulent reports of the financial condition of the Tire Company. The complaint then specifically charged the writing by the Bank of the letter before referred to and hereinafter more fully set out. In our view, under such a pleading, the plaintiff was entitled, as against J. C. Self, to recover if the jury found that the purchase of the tires was brought about by him with the fraudulent intent alleged."

C.J.S., Volume 37, page 448, Article 123, is in part as follows:

"The general rule that questions of fact are to be determined by the jury and questions of law by the court applies in an action for fraud. Thus, if there is proof as to all of the essential elements of fraud, and the evidence is conflicting, the question of fraud is one of fact for the jury, under proper instructions from the court as to what constitutes fraud, or for the court sitting as the trier of the facts * * *.

"* * * If there is a dispute as to the capacity in which the defendant acted in making the representations, the determination of that question is for the jury."

In the case of *Dairy Queen, Inc.* v. *Honorable Harold K. Wood*, 82 S.Ct., beginning on page 894, this Court in the opinion used the following language:

"1. Right to trial by jury is not lost as to legal issues which are characterized as 'incidental' to equitable issues. Fed. Rules Civ. Proc. rules 18(a, b), 38(a), 28 U.S.C.A.

"8. In action to collect a debt for breach of a contract, defendant has right to have jury determine not only whether contract has been breached and extent of damages, if any, but also just what contract was.

"At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury may be lost as to legal issues where those issues are characterized as 'incidental' to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts. In Scott v. Neely, decided in 1891, this Court held that a court of equity could not even take jurisdiction of a suit, in which a claim properly cognizable only at law is united in the same pleadings with a claim for equitable relief * * *.

"The Federal Rules did not, however, purport to change the basic holding of Scott v. Neely that the right to trial by jury of legal claims must be preserved. Quite the contrary, Rule 38(a) expressly reaffirms that constitutional principle, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.'

"In the eighth footnote is found the following:

"'It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in Beacon Theatres. It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of Beacon Theatres, as we construe it.' Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 5 Cir., 294 F.2d 486, 491".

Quoting further from the opinion:

"Nor is the legal claim here rendered 'purely equitable' by the nature of the defenses interposed by petitioner. Petitioner's primary defense to the charge of breach of contract—that is, that the contract was modified by a subsequent oral agreement—presents a purely legal question having nothing whatever to do either with novation, as the district judge suggested, or reformation, as suggested by the respondents here. Such a defense goes to the question of just what, under the law, the contract between the respondents and petitioner is and, in an action to collect a debt for breach of a contract between these parties, petitioner has a right to have the jury determine not only whether the contract has been breached and the extent of the damages if any but also just what the contract is.

"We conclude therefore that the district judge erred in refusing to grant petitioner's demand for a trial by jury on the factual issues related to the question of whether there has been a breach of contract. Since these issues are common with those upon which respondents' claim to equitable relief is based, the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims. The Court of Appeals should have corrected the error of the district judge by granting the petition for mandamus. The judgment is therefore reversed and the cause remanded for further proceedings consistent with this opinion.

"Reversed and remanded."

C.J.S., Volume 7, page 964, Article 127(a). Without quoting the authority, the authority holds that any transaction between the attorney and client after such relationship

exists is subject to suspicion and close scrutiny and that such transactions are regarded and discouraged by the policies of the law and will be closely scrutinized by the court and lean against the attorney, and if it appears that the transaction is unfair or that the client has been overreached or unduly influenced, it may be avoided at his election EITHER IN COURTS OF LAW OR IN COURTS OF EQUITY ON THE PRINCIPLES THAT GOVERN THE CONDUCT AND DEALINGS OF TRUSTEES AND FIDUCIARIES GENERALLY. Citing authorities.

The case of *Burnett, et al.* v. *Graves, et al.*, the Court of Appeals, Fifth Circuit, 230 F.2d 49, presented an action by an attorney or attorneys for attorney's fees. While the question was not contested, the case was tried before a jury and the jury returned a verdict in the amount of $85,000.00 for attorney's fees, and said in the body of the opinion as follows:

> "A jury was chosen as the instrument to determine what lawyers did, what they ought to have done, and what the value of those activities was in economic terms to the clients Burnett and Mel Dar. Under instructions submitting the proper standards with a wealth of persuasive, acceptable testimony, they have fixed it. It is reasonable. It is legal. It is approved."

While this case does not determine the question of right to jury trial, one was granted and not questioned by either side.

## CONCLUSION

There are many Federal cases holding that a party is entitled to a jury trial on the question of fraud and no consideration, and overreaching by a person who has confidential relationship such as attorney and client. The Oklahoma case construing a situation of this kind has been cited as *Hauenstein* v. *McCallister, supra.* The case of *Rupp.* v. *Cool* by the Supreme Court of Colorado, in addition to the other authorities, set forth the rule.

In addition to these questions, we call to the Court's attention the Oklahoma case cited in our original brief on page 24, *Watson* v. *American Creosote,* to the effect that an agreement to do or the doing of that which he is already bound to do does not constitute sufficient consideration for a new promise. At the most, it is only an agreement that such person was only bound to do and did not constitute a sufficient consideration.

To the same effect is the case of *Johnson* v. *Tanner,* 369 P.2d 307, and the case of *Cueno Press, Inc.* v. *Claybourn Corporation,* 90 F.2d 233. The Court of Appeals of the 7th Circuit used this language:

> "Modification of a contract by subsequent agreement is subject to the rules governing all contracts. Consequently any promise therein contained to do that which one is already obligated to do confers no advantage on the promisee, imposes no detriment on the promisor and is without consideration: 1 Williston on Contracts (1936) § 130; 1 Page on Contracts, § 589; Alaska Packers' Ass'n v. Domenico, 117 F. 99 (C.C.A. 9); Empire State Surety Co. v. Hanson, 184 F. 58

(C.C.A. 8); Frankfurt-Barnett Co. v. William Prym Co., 237 F. 21 (C.C.A. 2); In re American Range & Foundry Co. (D.C.) 14 F.2d 466; Brunswig Grain Co. v. Anchor Grain Co., 10 F.2d 304 (C.C.A. 5); G. S. Johnson Co. v. Nevada Packard Mines Co. (D.C.) 272 F. 291. In other words, consideration is necessary to support a waiver or release of rights whether accomplished by an original instrument or by a modification of an existing contract. Frankfurt-Barnett Co. v. Prym Co., 237 F. 21 (C.C.A. 2); Empire State Surety Co. v. Hanson, 184 F. 58 (C.C.A. 8); Weed v. Spears, 193 N.Y. 289, 86 N.E. 10; Goldsborough v. Gabie, 140 Ill. 269, 29 N.E. 722, 15 L.R.A. 294.

"The controversy between the parties in this connection, then, is as to whether there was any consideration for the modification. A consideration, in the legal sense of the word, is some right, interest, benefit, or advantage conferred upon the promisor, to which he is otherwise not lawfully entitled, or any detriment, prejudice, loss, or disadvantage suffered or undertaken by the promisee other than such as he is at the time of consent lawfully bound to suffer. 13 Corpus Juris 311; 6 Ruling Case Law 654; Tollenetti v. Mellor, 323 Ill. 143, 153 N.E. 744; Kilborn v. Pyne, 279 F. 864 (C.C.A. 5); Goodman Mfg. Co. v. Mammoth Vein Coal Co., 185 Iowa 253, 168 N.W. 912 * * *."

The Petitioner, as we view it, is entitled to a jury trial on the issues of fraud, actual and constructive, no consideration for the letter of the 25th of September, since said letter is presumptively fraudulent and the burden is upon the Respondent to show its fairness, and is entitled to have the jury determine whether or not the Petitioner herein was overreached by his lawyer, and whether or not the signing of said letter of September 25th constituted his free and

mutual agreement to the terms of said letter and these matters are all jury matters, as we view it, and we can make no distinction between a case where a suit is brought on an insurance policy, which is of course a contract, and the defense is that it was procured by fraud and the case at bar, for here we have the Respondent in his Answer and Cross-Complaint setting up the letter of September 25th and the Petitioner by his Reply thereto alleging that the letter was obtained by fraud, without consideration and that he was overreached or persuaded by his attorney to sign his letter and the same lacked mutuality.

The Petitioner most respectfully states to the Court that he at no time attempted to deprive the Respondent of a reasonable attorney's fee as provided in the letter of July 18th, and we feel that a jury will award him a reasonable attorney's fee when the matter is properly presented to the jury. We therefore respectfully ask this Honorable Court to review said cause and grant to the Petitioner a jury trial herein under the Constitution of the United States and the Federal Rules of Civil Procedure.

JOHN B. OGDEN,
1408-9 Liberty Bank Building,
Oklahoma City 2, Oklahoma,
*Attorney for Petitioner,*

*Of Counsel:*

JACK M. HIGHLY,
Mutual Savings Building,
Oklahoma City, Oklahoma.

January, 1963.

## CERTIFICATE

I certify that I mailed a true and correct copy of this Reply Brief for Petitioner on Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, to Peyton Ford, 1000 Connecticut Ave., N.W., Washington, D.C., by depositing the same in the United States mail with sufficient postage attached thereto on this 22nd day of January, 1963.

JOHN B. OGDEN